No. 83-2021

In The

Supreme Court of the United States

October Term, 1983

JOSEPH MANDARINO,

Petitioner,

vs.

MARDYTH POLLARD, Individually and in her capacity as Mayor of the Village of Lombard, Illinois; WARREN BROWNING, Individually and in his capacity as Village Manager of the Village of Lombard, Illinois; GREGORY YANGAS, Individually and as Trustee of the Village of Lombard, Illinois; WILLIAM FRANCIS, Individually and as Trustee of the Village of Lombard, Illinois; JOHN GARRITY, Individually and as Trustee of the Village of Lombard, Illinois; and THE VILLAGE OF LOMBARD, ILLINOIS, a municipal corporation and governmental subdivision of the State of Illinois.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

SARAH HANSEN SOTOS
JUDGE & KNIGHT, LTD.
422 North Northwest Highway
Park Ridge, Illinois 60068
(312) 696-2810

PATRICK A. LUCANSKY
KLEIN, THORPE & JENKINS, LTD.
180 North LaSalle Street
Chicago, Illinois 60601
(312) 984-6400

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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Respondents, MARDYTH POLLARD, WARREN BROWNING, GREGORY YANGAS, WILLIAM FRANCIS, JOHN GARRITY, and THE VILLAGE OF LOMBARD, respectfully pray that this Court deny the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on October 7, 1983.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 718 F.2d 845 (7th Cir. 1983) and appears in Petitioner's Appendix at pages 1a-11a. The unpublished Memorandum Opinion of the United States District Court for the Northern District of Illinois, Eastern Division, appears in Petitioner's Appendix at pages 13a-31a.

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RESPONDENTS' STATEMENT OF THE CASE

The facts material to the consideration of the questions presented in the Petition are drawn from Petitioner's Complaint. Those facts, which are merely allegations at this stage of litigation, and which must be taken as true for the purpose of ruling on Respondents' motions to dismiss Petitioner's Complaint, were set forth by the Court of Appeals as follows:

> "The appellant's basic grievance is his allegedly wrongful discharge as chief of police of the Village of Lombard, Illinois. He was hired for this position pursuant to Section 2.40.020 of the Lombard Village Code, which states:
>
> > The Village Manager is authorized to appoint, suspend or discharge the Chief of Police without the consent of the Board of Trustees.
>
> Mandarino became chief of police in November, 1977; in June, 1979, the village manager gave him written notice of his termination, again pursuant to section 2.40.020 of the Village Code. The manager made no allegations of wrongdoing, but simply stated that

Mandarino's performance in his position had fallen short of the manager's expectations.

Mandarino asked to be informed of the specific reasons for his termination and requested a public hearing on the matter. Both requests were denied. He then brought suit against the Village of Lombard in the circuit court for DuPage County, Illinois. In this state court action Mandarino sought a declaratory judgment that he had been wrongfully terminated and that section 2.40.020 of the Lombard Village Code was contrary to Illinois law. The latter claim was based on Mandarino's contention that the local code conflicted with a state statute governing the hiring and firing of police chiefs and also that it violated the due process and equal protection clauses of the Illinois Constitution. The appellant's complaint in his state court action also included a second count, in which he requested a preliminary injunction enjoining the Village of Lombard from hiring anyone other than himself as its permanent chief of police.

Following a hearing, the Illinois circuit court granted the village's motion for judgment on the pleadings. Mandarino appealed this determination to the appellate court of Illinos, which affirmed the circuit court's judgment. *Mandarino v. Village of Lombard,* 92 Ill. App.3d 78, 414 N.E.2d 508 (1980). Mandarino petitioned for leave to appeal this decision to the Illinois Supreme Court. His petition was denied.

Mandarino then brought the federal court action that is the subject of this appeal. In his complaint, he alleged that the circumstances of his discharge, particularly the failure to provide him with a name-clearing hearing, violated his civil rights under 42 U.S.C. §§ 1981, 1983, 1984, 1985 and 1988, as well as the first, fifth, and fourteenth amendments to the United States Constitution. In addition to the Village of Lombard, the appellant named as defendants the village mayor, the village manager, and several trustees of the village board. These persons were sued in both their

> official and individual capacities. Along with his federal civil rights claims, Mandarino asserted two pendent state law claims, for interference with prospective economic advantage and wrongful discharge.
>
> The defendants moved to dismiss the complaint on the basis that the earlier state court judgment barred Mandarino, under principles of *res judicata,* from pressing his claims in federal court. The district court granted the motion and dismissed the complaint. This appeal followed.

Mandarino, supra, 718 F.2d at 847; Petitioner's Appendix at 4a-5a.

Petitioner's reference to the basis of the holding of the Court of Appeals, set forth in his Statement of the Case, requires clarification. The Court of Appeals found that, since Mandarino had not raised his "declaratory judgment exception" argument in the Court below, he was barred from presenting it at the Court of Appeals. Next, the Court of Appeals ruled that, even if he were not so barred, Illinois has not adopted the "declaratory judgment exception" rule, and therefore the rule would have no applicability to the case at bar. Finally, the Court of Appeals concluded that, even if the "declaratory judgment exception" to the doctrine of *res judicata* were found applicable, " . . . Mandarino's pursuit of injunctive relief in his prior state court action would remove him from the protection of the rule." *Mandarino, supra,* 718 F.2d at 848-9; Petitioner's Appendix at 8a.

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REASONS FOR DENYING THE WRIT

I.

The Court Of Appeals' Determination That The "Declaratory Judgment Exception" To The Doctrine Of Res Judicata Does Not Apply To The Case At Bar Was Correct, And Is Consistent With The Decisions Of The Supreme Court And With Illinois Law.

That Petitioner has cited not a single Illinois decision adopting, or even referring to, any "declaratory judgment exception," is no accident. As the Court of Appeals noted, Petitioner likewise offered no authority, in the proceedings below, for his assumption that Illinois courts have applied the "declaratory judgment exception" at any time. The one Illinois decision he did cite below, *LaSalle National Bank v. County of DuPage,* 77 Ill.App.3d 562, 396 N.E.2d 48 (1979), is not referred to in his Petition, perhaps because, as the Court of Appeals stated,

> "Although that case did hold that a second suit was not precluded by a prior declaratory judgment, the rationale relied on by the Court arose from the special characteristics of zoning cases. No weight was given to the fact that the prior action had involved only a declaratory judgment." *Mandarino, supra,* 718 F.2d at 848; Petitioner's Appendix at 7a.

Therefore, Petitioner's contention that the Court of Appeals erred in misinterpreting the significance of Petitioner's joinder, in his prior state court action, of claims for declaratory *and* injunctive relief, overlooks the more fundamental fact that the Court of Appeals ruled, initially, that Illinois courts have never recognized or applied, expressly or impliedly, any "declaratory judgment exception" to the doctrine of *res judicata.*

II.

The Court of Appeals' Determination That Traditional Rules Of Res Judicata Barred Petitioner's Claim Was Correct, And Is Consistent With The Decisions Of The Supreme Court And With Illinois Law.

Petitioner persists in confusing the doctrine of *res judicata* and collateral estoppel, or, as this Court termed the doctrines in *Migra v. Warren City School District Board of Education*, — U.S. —, 104 S.Ct. 892 (1984), claim preclusion and issue preclusion. Petitioner cites this Court's statement in *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 102 S.Ct. 1883 (1982), regarding the doctrine of collateral estoppel, despite the fact that the case at bar in no way concerns that doctrine (see page 28 of the Petition); likewise, Petitioner cites an Illinois Appellate Court decision, *City of Burbank v. Glazer*, 76 Ill.App.3d 394, 395 N.E.2d 97 (1979), for the proposition that "Illinois adheres to the principle that where a cause of action is different from that brought in a prior suit, the parties are bound not by issues which 'could have been litigated' but only those that were actually litigated" (see page 32 of the Petition), despite the fact that *Burbank*, again, was a collateral estoppel case, not one involving *res judicata*.

Petitioner thus, perhaps unintentionally, attempts to mislead this Court by arguing that, under Illinois law, he would not have been precluded from raising his federal court claims in a subsequent suit, even though he had not raised them in his prior suit. Petitioner is apparently attempting to bring himself within this Court's ruling in *Migra, supra*. However, the key distinction between *Mi-*

darino and *Migra,* is that, unlike Ohio, Illinois is not in the process of modifying its claim preclusion doctrine, nor has Petitioner so contended.

The following decisions of Illinois courts and of federal courts interpreting Illinois law, and the cases cited therein, uniformly provide that *res judicata* bars all claims which were raised or could have been raised in a prior suit:

> *Bass v. Scott,* 79 Ill.App.3d 224, 398 N.E.2d 236 (1979): Plaintiff's declaratory judgment action against State Attorney General barred by prior suit for writ of mandamus against State Attorney General, as both actions sought enforcement of provisions of Illinois Optometrists Act.
>
> *Gasbara v. Park-Ohio Industries,* 655 F.2d 119 (7th Cir. 1981): Plaintiff's subsequent suit seeking fringe benefits from former employer barred by prior suit against same defendant for unpaid salary and bonuses.
>
> *Diaz v. Indian Head,* 686 F.2d 558 (7th Cir. 1982): Plaintiff's subsequent suit against former employer seeking commissions on sales completed after termination of his employment barred by prior suit against same defendant to have non-competition clause in employment contract declared unenforceable.

It is therefore clear that Illinois law bars those claims Petitioner raised in his federal court suit, as they all could have been raised in his prior state court action.

Petitioner's citation to *Industrial National Mortgage Company v. City of Chicago,* 95 Ill.App.3d 666, 420 N.E.2d 581 (1981) is not contrary, as it, like *LaSalle National Bank v. County of DuPage, supra,* concerned a zoning case in which a second suit challenging zoning restrictions was allowed because of changed factual circumstances.

Finally, Petitioner's reliance on *Wozniak v. County of DuPage,* 569 F.Supp. 813 (N.D.Ill. 1983) is misplaced, since the District Court plainly stated that it would allow a second suit against the same defendants sued by plaintiff in a prior suit because, *inter alia,* first, the facts of a conspiracy among the defendants were not available to plaintiff when the first suit was brought, and, second, plaintiff had won his first suit. As the District Court stated,

> "There are solid policy reasons for protecting a victorious defendant from repeatedly being hauled into court to answer to plaintiffs' successive bites at a single apple . . . Plaintiffs thus take their "second bite" from a far more favorable posture than the litigant who is unable to accept the fact of his initial loss." *Wozniak, supra,* 569 F.Supp. at 817.

The Court of Appeals' decision finding that Illinois has not adopted the "declaratory judgment exception" to the *res judicata* doctrine, that even if it had, petitioner would not fit within it, and that the traditional elements of *res judicata* barred petitioner's suit followed existing case law, and is in no way inconsistent with any decisions of this Court or with Illinois law.

III.

The Court Of Appeals' Determination That The "Declaratory Judgment Exception" Argument Of Mandarino Was Not Properly Before The Court On Appeal Was Correct.

Petitioner's contention that he did in fact raise his "declaratory judgment exception" argument in the District Court requires little attention, and would no doubt surprise the District Court. Nowhere in its 19-page opin-

ion is there any hint of Petitioner's "declaratory judgment exception". See Petitioner's Appendix at 13a-31a. Nor has Petitioner offered any refutation of the Court of Appeals' statement that:

> "Nowhere in his brief was the declaratory judgment exception mentioned. Section 33 of the Restatement (Second) of Judgments was not cited; neither were the cases Mandarino relies on in this Court to establish the "exception." *Mandarino, supra,* 718 F.2d at 848; Petitioner's Appendix at 6a.

Instead, Petitioner apparently assumes the District Court should have been gifted with extrasensory perception, for without powers of divination, the District Court could not have discerned Petitioner's "declaratory judgment exception" argument.

Perhaps realizing the hollowness of that argument, Petitioner then submits that the "ends of justice" require consideration of his "declaratory judgment exception" theory. Since the Court of Appeals did, in fact, consider —and reject—Petitioner's theory, it is unclear how justice has not been served. That the Court of Appeals chose to disagree with Petitioner is not proof of any miscarriage of justice.

IV.

There Are No Special Or Important Reasons Requiring Supreme Court Review Of This Case.

Petitioner has asserted no compelling reason for this Court to accept this case. He has argued no "split in the Circuits" regarding the "declaratory judgment exception", and indeed it would be difficult to imagine such a split concerning a rather obscure interpretation of Illinois state law. He has failed to demonstrate that the Court of

Appeals decided an important question of Illinois law in a way which is in conflict with Illinois law. He has proffered no important question of Federal law which should be decided by this Court, nor has he established any real conflict between the decision of the Court of Appeals and those of this Court. Finally, he has furnished no basis for the invocation of this Court's supervisory powers.

CONCLUSION

Because there are no special or important reasons for reviewing this case, the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

Sarah Hansen Sotos
Judge & Knight, Ltd.

Patrick A. Lucansky
Klein, Thorpe & Jenkins, Ltd.

Counsel for Respondents